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No. 91-1523

In the
Supreme Court of the United States

OCTOBER TERM, 1992

FLORENCE COUNTY SCHOOL DISTRICT FOUR, ERNEST K. NICHOLSON, SUPERINTENDENT, IN HIS OFFICIAL CAPACITY, AND SCHOOL BOARD MEMBERS BENNIE ANDERSON, MONROE FRIDAY, JACK ODOM, ELRITA BACOTE, T.R. GREEN, JAMES W. HICKS, IN THEIR OFFICIAL CAPACITY,
Petitioners,

v.

SHANNON CARTER, BY AND THROUGH HER FATHER AND NEXT FRIEND, EMORY CARTER,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the Fourth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether a court exercising its broad discretion to award appropriate relief under 20 U.S.C. § 1415(e)(2) may order a school system that has defaulted on its obligation to provide a free appropriate public education to a child with disabilities to reimburse her parents for the cost of a substitute private placement "proper under the Act," irrespective of whether the private placement meets the technical requirements that the IDEA imposes on State and local educational authorities when they place children in private schools.

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BRIEF FOR RESPONDENTS

STATEMENT

Facts

By the time she was a ninth grade student in one of the schools operated by Petitioners, Respondent Shannon Carter was functionally illiterate.[1] Shannon had experienced academic difficulties from an early age. Pet. App. 23a; C.A.J.A. 47; 358-59; 388. From the time she enrolled in the seventh grade in petitioner Florence County School District Four in 1982, she experienced continued academic failure. C.A.J.A. 358-59, 361. Mrs. Carter requested that Shannon be tested after her first semester in public school because she did not think her daughter could read. C.A.J.A. 49. Mrs. Carter's oldest child, a son who also attended public school in the petitioner district, had also been diagnosed as having developmental dyslexia. C.A.J.A. 358-59; 361; 385.[2]

After Mrs. Carter became concerned that Shannon apparently was not able to read, an educational evaluator for the district, Cecil Ray Hill, who was not certified as a school

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[1] J.A. at 9. J.A. refers to the Joint Appendix filed in this Court pursuant to Supreme Court Rule 26. C.A.J.A. refers to the Joint Appendix filed with the Court of Appeals, copies of which were lodged by the Petitioners with the Clerk of this Court at the time the Petition for Certiorari was filed. The Petition for Certiorari is cited as "Pet. __"; "Pet. App.__" refers to the appendix to the Petition for Certiorari; Petitioner's Brief on the merits is cited as "Pet'r Br. __." Respondent's Brief in Opposition is cited as "Resp. __."

[2] The essential feature of developmental reading disorder, also referred to as dyslexia, is marked impairment in the development of word recognition skills and reading comprehension that is not explainable by mental retardation nor due to a visual or hearing defect or neurologic disorder. The disorder is more common among first degree biological relatives than in the general population. *Diagnostic and Statistical Manual of Mental Disorders* 39-48 (3d ed. rev. 1987) (DSM-III-R).

psychologist or qualified to assess students with learning disabilities, J.A. 3-4; C.A.J.A. 72, tested Shannon in February, 1983. J.A. 3-4; C.A.J.A. 65; 72. Mr. Hill testified that he did not know at the time how Shannon was performing in the classroom. J.A. 4; C.A.J.A. 71. Mr. Hill was unable to locate any records of Shannon's 1983 test results at the time of trial in 1988-89. J.A. 3; C.A.J.A. 66. His recollection was that he administered to Shannon an IQ test and an achievement test, "more likely than not" the Wechsler Intelligence Scale for Children, Revised [WISC-R] and Peabody Individual Achievement Test [PIAT]. J.A. 3; C.A.J.A. 66. He recalled that Shannon did not qualify as learning disabled because there was not a significant discrepancy between her slightly above average IQ and slightly below average achievement test result. C.A.J.A. 66-67. Instead, he thought the results indicated, "maybe slightly a slow learner, slightly on the slow side, you know." J.A. 4, C.A.J.A. 138-39. After this evaluation, which did not comply with the detailed criteria for determining the existence of a learning disability set out at 34 C.F.R. § 300.541, C.A.J.A. 70, 78, Shannon's parents were told that their daughter could do the work if she wanted to but that she lacked motivation. C.A.J.A. 49.

During the next two years Shannon continued to experience severe academic difficulties. *Id.* at 49, 385. Shannon's parents punished her for poor grades because they believed the district's conclusion that she was lazy and unmotivated. *Id.* at 49. In the spring of 1985, Mrs. Carter again requested that Shannon be tested, when she discovered that her daughter was failing most of her courses and had changed her first semester failing grades on her report card. *Id.* at 138-39; Mrs. Carter was also very concerned that Shannon appeared to be seriously depressed. *Id.* at 139.

In April, 1985, when Shannon was in ninth grade, a certified school psychologist finally diagnosed her as having a

learning disability. *Id.* at 361-63. Her evaluation indicated a verbal IQ of 81 and a performance IQ of 117; various subtests indicated reading ability levels from 4.7 grade level to a 6.8 level. *Id.* at 362, 364. These findings attested to the presence of a "serious learning disability," Pet. App. 25a, which had gone unnoticed by the school district for almost three years. Nevertheless, petitioner's evaluation described Shannon's disability as "one which is felt to have been acquired and fostered over a period of time in which [Shannon] did not apply the skills which she seems to possess." C.A.J.A. 363. All of the experts who testified at trial agreed that "absent a traumatic injury to the head, a learning disability does not naturally develop in a child who previously did not suffer from one." Pet. App. 24a n.2.

Following the evaluation, the school district offered an Individualized Education Program ("IEP") for Shannon, to which she was entitled under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1401-1485 (1988 & Supp. III 1991). Petitioner proposed that Shannon be placed in the resource room at Timmonsville High School. C.A.J.A. 121, 147. On May 1, 1985 a meeting was held to discuss the district's proposal. The Carters vigorously opposed the resource room placement. J.A. 6-7, C.A.J.A. 154. Mr. and Mrs. Carter were accompanied to the meeting by Ms. Linda Summers, a psychiatric social worker whom they had hired the prior February to provide counseling services to help Shannon cope with serious depression. C.A.J.A. 38. In her professional capacity and as the individual who initially identified Shannon's disability, C.A.J.A. 386, she came to the IEP meeting to offer insight into the development of a program that might enable Shannon to receive educational benefit. C.A.J.A. 366. Ms. Summers warned district personnel that placement in the district's resource room program would further damage Shannon's self-esteem, stigmatize her, and prevent her from obtaining the individual attention she needed.

J.A. 6-7; C.A.J.A. 154.[3] Although she expressed concern that school district personnel not place unrealistic academic demands upon Shannon, whom the district had deprived of an appropriate education for more than three years, Ms. Summers very explicitly stated that she was not an educator. C.A.J.A. 119.

At the May 1, 1985, meeting, Mr. Carter specifically told district personnel that he wanted his daughter to read on a 12th grade level when she was graduated from high school. C.A.J.A. 118-19. The IEP ultimately proffered by the district covered the period May 2, 1985, to June 1986, Pet. App. 27a, and provided for less than three hours per week of special instruction.[4] The goal of the year-long IEP was for Shannon to advance in reading skills from a 5.4 grade level to a 5.8 grade level, only four months' progress. Pet. App. 5a; C.A.J.A. 346, 366. Long term goals for math likewise called for four months' progress over the

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[3] Dr. James G. Ward, Jr., a pediatrician specializing in the treatment of learning disabilities, also testified that placing Shannon in the proposed resource room program would have been detrimental to her. C.A.J.A. 188-89.

[4] The IEP called for an itinerant model of services rather than placement in the resource room. C.A.J.A. 146, 366. The opinion of the District Court describes these programs:

> Pursuant to 20 U.S.C. sec. 1412 the South Carolina State Board of Education adopted Regulations 43-243 which at page 144 explained the difference between an itinerant program and a resource class as follows: In an itinerant program the specialist will provide continual ongoing services to handicapped pupils and teachers taught in regular classroom setting. A resource room program shall involve pupils who will remain in regular classrooms for the major part of the day and will be scheduled into the resource room for one or more periods of individualized instruction contingent on pupil's needs.

Pet. App. 26a n.7.

entire year. Pet. App. 5a; C.A.J.A. 346, 366. Ms. Lisa Free, the special education teacher who would have worked with Shannon under the district's IEP, testified that Shannon would never have been at grade reading level by the twelfth grade if the IEP goals remained at four months' improvement per school year. C.A.J.A. 296. The IEP -- with its limited services, limited expectations and unacceptably limited long-term goals[5] -- did not reflect any understanding that Shannon had a severe disability for which petitioner had denied her three years of specialized instruction and related services that might have enabled her to compensate for her disability and close the gap with her nondisabled peers. C.A.J.A. 147-48, 347. During this period of time, the Carters hired a private tutor for Shannon, enabling her grades for the final marking period of the 1984-85 school year to improve. C.A.J.A. 149-50.

Dr. Allison Grant, an independent child and adolescent psychiatrist who evaluated Shannon in July 1985, J.A. 17-18, described her symptoms as including "depressed mood, feelings of hopelessness and pessimism (especially around academics/school areas) and suicidal ruminations (contemplating cutting her wrist)." C.A.J.A. 386. These symptoms were present for a one and a half to two year period before Ms. Summer's evaluation in February 1985 -- that is, practically the entire time that Shannon was enrolled in petitioners' schools. *Id.* at. 386, 223-25. Dr. Grant's written evaluation states that Shannon was unable to utilize some of the skill areas that she possesses not because of any "lack of motivation on her part or a result of passive-resistive and manipulative behaviors, but more a result of the failures of the [school] system." C.A.J.A. 388-89. "The failure of detection and needed academic approach," according to Dr. Grant's evaluation, "clearly interfered not only with her

[5] C.A.J.A. 158, 160-61; 226; 336-37; 366.

learning/academic progress but was the major (and probably sole) factor . . . for the significant depression that she has experienced . . . as well as the family conflicts." C.A.J.A. 388. Further, the district's low expectations were "extremely detrimental" psychologically to Shannon. J.A. 19. Shannon herself stated that she was scared to ask for help from the Timmonsville school teachers because, "I was scared I was dumb, stupid." C.A.J.A. 254.

Shannon's learning disability was exacerbated by a belatedly diagnosed attention deficit disorder. C.A.J.A. 149-50; 180-81.[6] Her learning disability was so severe that in the fall of 1985, she was described by a learning disability specialist as "functionally illiterate." J.A. at 9; C.A.J.A. 173, 176. She needed an intensive multi-sensory teaching program designed for children with neurologically-based learning disabilities; this self contained program would provide a low student-teacher ratio, small classes, and intense remediation in reading and written expression. C.A.J.A. 173, 175; C.A.J.A. 187-89, 191; C.A.J.A. 388. No intensive self-contained program for students with neurologically-based learning disabilities was available at Timmonsville High School. C.A.J.A. 85; 125, 133-34, 136; 148; 354-55. The school district never offered to develop such a program to meet Shannon's educational needs, either at the school itself--the only high school in the district--or through an agreement with another school district, as authorized by South Carolina law. J.A. 25;

[6] The essential features of Attention Deficit Disorder, also referred to as Attention-Deficit Hyperactivity Disorder, are developmentally inappropriate degrees of inattention, impulsiveness, and hyperactivity. People with the disorder generally display some disturbance in each area, but to varying degrees. Symptoms typically worsen in situations requiring sustained attention, such as listening to a teacher in a classroom. Persons often give the impression of not listening or not hearing what is said. Work is often messy, and performed carelessly, impulsively and incompletely. DSM-III-R, *supra* note 2, at 50-51.

C.A.J.A. 136; 148; 191; 240; S.C. Code Ann. § 59-33-50 (Law. Co-op. 1976). As the District Court noted, the Carters were "prevented by state law from independently seeking a placement for Shannon in any public school outside of her district." Pet. App. 30a n.11.

Faced with Petitioner's refusal to provide an appropriate IEP in a public school program, Mr. and Mrs. Carter attempted to locate a private school capable of providing Shannon with an appropriate education. Unlike some other states, South Carolina does not maintain a list of private schools that are generally approved by the state as providers of special educations that meet relevant state education standards; private school placement is determined on a case-by-case basis. *See* S.C. Code Regs. 43-243(E), Resp. App. 2a-3a. Left to their own devices by Respondent, the Carters identified Trident Academy, a private school specializing in the education of students with learning disabilities. Pet. App. 28a. No process existed by which the Carters could obtain a determination from the South Carolina Department of Education as to whether Trident Academy met its standards, or by which they could have obtained the Department's approval of Trident as a placement for Shannon. Under South Carolina's regulatory scheme, private schools are approved by the Department of Education for the placement of a particular child only upon the application of a local school district wishing to make the placement at its expense. *Id.*

Shannon enrolled at Trident Academy in September 1985, at the beginning of tenth grade. Pet. App. 28a. South Carolina school districts have placed students at Trident pursuant to IDEA on at least three other occasions, as have districts in other states. J.A. 14; Pet. App. 28a; C.A.J.A. 209. The South Carolina Department of Education has never disapproved an application for placement at Trident, J.A. 14; Pet. App. 28a, which is fully accredited by the Southern Association of Colleges and Schools

and the Palmetto Association of Independent Schools. J.A. 13; C.A.J.A. 208; Pet. App. 28a.

Trident established written student goals on a quarterly basis, formulating them in much the same language as used in IEPs. C.A.J.A. 200; Pet. App. 11a. Trident also evaluated its students on a quarterly basis, in contrast to the annual review required by IDEA. Pet. App. 37a. The district court's appointed expert concluded that Trident "did a very effective job" in teaching Shannon, allowing her to advance three grade levels in reading ability in three years. C.A.J.A. 330; Pet. App. 6a-7a, 29a; see also C.A.J.A. 343-45. Shannon graduated from Trident in 1988 with a high school diploma.[7] Pet. App. 5a; District Court transcript May 9, 1989, page 130, lines 12-13.

During the time that Shannon attended Trident, two members of its teaching staff apparently lacked a particular type of teacher certification. It is unclear whether the two individuals lacked any teacher certification at all, whether they were certified elsewhere but not by South Carolina, or whether they were certified but not in special education.[8] It is also unclear whether this situation actually violated South Carolina standards, which permit schools to have up to 10% of classroom instruction time

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[7] South Carolina awards both diplomas and certificates at the completion of the twelfth grade. A diploma indicates that the student has passed an exit examination, whereas a certificate merely indicates attendance. S.C. Code Regs. 43-259 (1992).

[8] See C.A.J.A. 195-96 (testimony of Margaret Mitchell, agreeing with statement that two Trident faculty members "are not certified teachers") and C.A.J.A. 314 (testimony of John Richardson, answering "yes" when asked if he had heard testimony that all but two of the teachers at Trident "are certificated in special education"; Dr. Richardson also stated that "in a local school district learning disability resource room placement, the great majority of other academic area teachers would not be certificated in special education.").

taught by teachers who are not properly certified. *See* S.C. Dept. of Education, Defined Minimum Program for South Carolina School Districts (1986) at 53, reprinted at Pet. App. 71a-72a. In any event, only one of the teachers in question taught Shannon, and even then only for her first year at Trident. J.A. 8, 13.[9]

PROCEEDINGS BELOW

Administrative Proceedings. Pursuant to the procedures set forth in IDEA, the Carters requested a due process hearing concerning the inadequate IEP proffered by the school district. An administrative hearing was conducted by a local hearing officer on August 20, 1985. Pet. App. 44a-55a. After the hearing officer ruled against them, the Carters exercised their right under IDEA to seek an impartial review by the state education agency. Declining to request additional evidence, despite the regulations implementing the IDEA which require a state review officer to seek additional evidence where necessary, 34 C.F.R. § 300.510(b), the state review officer affirmed the hearing decision on October 14, 1985. Pet. App. 40a-43a.

Judicial Proceedings. Following the final adverse administrative decision, Mr. Carter filed suit on behalf of his daughter, contending that petitioner had failed to provide her the free appropriate public education required by IDEA. The Carters sought a determination that the district had violated Shannon's rights under the IDEA; an award of retroactive reimbursement for the costs they had incurred in providing an appropriate education at Trident Academy; and an award of reimbursement for their

[9] Petitioner does not question the certification of any of Shannon's other first year teachers, or any of her second or third year teachers.

future expenses at Trident. C.A.J.A. 13. After a three day trial,[10] which included testimony of a court-appointed expert witness, the District Court ruled in favor of the Carters. The court found that the long-term goals set in the IEP proposed by petitioner "were wholly inadequate," Pet. App. 27a; that "the stated progress of only four months in her reading and math skills over an entire school year ensured the program's inadequacy from its inception," Pet. App. 36a; that the less than three classroom hours per week of special instruction failed to meet her educational needs; *id.*, and that "Florence County School District Four failed to provide Shannon Carter with a free appropriate public education." *Id.* The court found, in contrast, that "Trident Academy provided Shannon an excellent education in substantial compliance with all the substantive requirements of the EHA [IDEA]." Pet. App. 37a. The court also found that the tuition and fees charged by Trident were reasonable, and noted that petitioner had offered no evidence that Shannon could have received the services provided by Trident at a lower cost, or closer to her home. Pet. App. 30a. Relying upon this Court's decision in *School Committee v. Department of Education*, 471 U.S. 359 (1985) (*Burlington*) and explicitly taking into account equitable considerations, the district court held that the Carters were entitled to reimbursement for the full expense of Shannon's placement at Trident.

On appeal to the Fourth Circuit, petitioner challenged neither the district court's finding that Trident had provided Shannon with an appropriate education nor the amount of reimbursement it had ordered. Pet. App. 10a n.2. The appellate court rejected petitioner's contention that it had, in fact, provided respondent with a free and appropriate public education, finding

[10] The trial began in July 1988, Pet. App. 23a, by which time Shannon had been graduated from Trident.

that the district court had properly concluded that the petitioner's proposed IEP and placement "failed to satisfy the Act's requirement of more than minimal or trivial progress." Pet. App. 8a. The court further held that the Carters' rejection of the proposed resource room placement in favor of the itinerant program did not relieve petitioner of liability. Pet. App. 9a.

The Fourth Circuit also rejected the petitioners' contention that IDEA precluded reimbursement of the Carters' expenses because Trident had not been approved by the state for Shannon's placement and, in petitioner's view, could not have been because of questions concerning the certification of two teachers and the use of IEPs. Pet. App. 9a-12a. Interpreting *Burlington*, the Fourth Circuit held that in requiring that a private school placement be "proper under the Act," 471 U.S. at 369, in order to be reimbursable, this Court did not intend "to impose on private schools chosen by parents the whole panoply of duties that the Act imposes on the state." Pet. App. 16a. Further reasoning that "it hardly seems consistent with the Act's goals to forbid parents from educating their child at a school that provides an appropriate education simply because that school lacks the stamp of approval of the same public school system that failed to meet the child's needs in the first place," Pet. App. 18a, the Fourth Circuit affirmed the judgment of the district court in its entirety. Pet. App. 19a.

SUMMARY OF ARGUMENT

The question before this Court is whether parents who place their child with disabilities in a private school which successfully provides the child the special education and related services to which she is entitled, after the public school district has failed to do so, are entitled to reimbursement for their expenses, regardless whether the private school meets the statutory definition of a free appropriate public education.

The purposes of the IDEA are to enable children with disabilities to obtain equal educational opportunities by providing necessary special education and related services and to provide remedies for violations of those rights. 20 U.S.C. §§ 1400(c); 1415(e)(2); *Smith v. Robinson*, 468 U.S. 992 (1984). Federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute. *Franklin v. Gwinnett County Public Schools*, 112 S.Ct. 1028, 1035 (1992). The Act accordingly allows courts wide discretion in fashioning remedies for its violation, 20 U.S.C. § 1415(e)(2), including repayment to parents for the expenses they incur in meeting the school district's obligation to provide a free appropriate public education.

The result reached by the Fourth Circuit neither encourages parents to circumvent the public education system nor threatens the public fisc. School districts can avoid being ordered to reimburse parents by providing a free appropriate public education. Parents still must be prepared to challenge the inappropriateness of the proposed individualized education plan, to advance the costs of private school education, and to take the risk that their decision will not be upheld.

This Court should not permit states and local educational agencies which fail to fulfill their obligations under IDEA to preclude parents from obtaining for their children an education consistent with the Act, "simply because," as the Court of Appeals stated, "that school lacks the stamp of approval of the same public school system that failed to meet the child's needs in the first place." Pet. App. 18a.

ARGUMENT

I. The Relief Authorized by the Decision Below is Consistent with 20 U.S.C. § 1415(e)(2) and this Court's

Decision in *Burlington*

A. The Standard for Reviewing a Parent's Unilateral Educational Placement was Previously Decided by this Court in *Burlington*

This Court recognized in *Burlington* that the language of 20 U.S.C. § 1415(e)(2) to "grant such relief [for violations of the Act] as the court determines is appropriate" confers "broad discretion on the court." 471 U.S. at 369. In *Burlington*, the parents of a child with disabilities withdrew him from the public school program and placed him at their expense in a state approved private school that provided specialized instruction and related services for children with learning disabilities under 20 U.S.C. § 1413(b). In a short and unanimous decision, this Court construed § 1415(e)(2) as including the authority to order a local education agency to reimburse parents for their expenditures for private school education if the public school's proposed individual education program [IEP] is inappropriate and the private school placement, is found "proper under the Act."

The principal purposes of IDEA are "to assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs [and] to assure that the rights of children with disabilities and their parents or guardians are protected." 20 U.S.C. § 1400(c).[11] Participating states and local school districts which develop a plan for identifying and providing all eligible children with disabilities a free appropriate public education consistent with procedural safeguards receive federal financial assistance under

[11] The legislative history of the IDEA (originally referred to as the Education of All Handicapped Children Act) is set out in *Board of Education of Hendrick Hudson School District v. Rowley*, 458 U.S. 176, 187-203 (1982).

the Act to assist them in meeting these goals. Among the procedural safeguards provided parents with respect to the provision of a free appropriate public education for their children, 20 U.S.C. § 1400(a), is the right to participate in the development of an "individualized education program", or IEP, and to challenge any proposed IEP with which they disagree in administrative and judicial proceedings. 20 U.S.C. §§ 1401(a)(20), 1415(b), (d), (e).

The IEP has been described as the *modus operandi*, *Burlington*, 471 U.S. at 368, or "centerpiece," *Honig v. Doe*, 484 U.S. 305, 311 (1987), of the Act. This written document is a comprehensive statement of the educational needs of the child with disabilities and the specially designed instruction and related services to be employed to meet those needs. 20 U.S.C. § 1401(a)(20). The IEP is to be developed jointly by a school official qualified in special education, the child's teacher, the parents or guardian, and the student, when appropriate. 20 U.S.C. § 1401(a)(20). As acknowledged in *Burlington*, because "this cooperative approach would not always produce a consensus between the school officials and the parents, and that in any disputes the school officials would have a natural advantage", 471 U.S. at 368, the Act incorporates an elaborate set of procedural safeguards "to insure the full participation of the parents and proper resolution of substantive disagreements." *Id.* The Act provides for parents to have access to "all relevant records with respect to the identification, evaluation, and educational placement of the child;" provides for parents to obtain "an independent education evaluation of the child;" and entitles the parents to "an impartial due process hearing," to resolve their complaints. *Id.* In addition, the Act provides for judicial review in state or federal court to "[a]ny party aggrieved by the findings and decision" of the due process hearing(s). *Id.* Section 1415(e)(2) explicitly provides that the reviewing court "shall receive the records of the administrative proceedings, shall

hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate."

Under the Act, it is expected that during the pendency of any administrative or judicial proceedings, unless the State or local educational agency and the parents or guardian otherwise agree, "the child shall remain in the then current educational placement of such child." 20 U.S.C. § 1415(e)(3). In *Burlington*, where the parents were challenging the appropriateness of their son's "then current educational placement," 471 U.S. at 371, and had unilaterally placed their son in a private school, the local educational agency argued that potential relief available under section 1415(e)(2) did not include reimbursement to parents for private school tuition and related expenses. Moreover, even if such remedy were available, the local educational agency (LEA) argued, section 1415(e)(3) barred parents from any such reimbursement who rejected a proposed IEP and placed their child in a private school without the consent of the LEA. *See Burlington*, 471 U.S. at 371.

Rejecting the LEA's' waiver argument which left parents an all or nothing option -- leave the child in an inappropriate placement or waive any claim to reimbursement -- this court correctly held in *Burlington* that section 1415(e)(2) "confers broad discretion on the court 'to grant such relief [it] determines is 'appropriate.'" 471 U.S. at 369. "Absent other reference," the Court reasoned that "the only possible interpretation is that the relief is to be 'appropriate' in light of the purpose of the Act." *Id.* Given the Act's primary purpose to provide children with disabilities "a free appropriate public education which emphasizes special education and related services to meet their unique needs," the Court noted that though "such education will be provided where possible in regular public schools," the Act contemplates "placement in private schools at public expense

where this is not possible." *Id.*, citing 20 U.S.C. § 1412(5); 34 C.F.R. §§ 300.132, 300.227, 300.307(b), 300.347. In a situation where a court determines that a private placement selected by the parents was "proper under the Act" and that an IEP calling for placement in a public school was "inappropriate," the Court found that 'appropriate' relief (under § 1415(e)(2)) would include "a prospective injunction directing the school officials to develop and implement at public expense an IEP placing a child in a private school." *Id.* at 370.

Because the "review process is ponderous," the Court understood that parents who disagree with the proposed IEP are confronted with a choice: "go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement." *Burlington*. Therefore, the Court reasoned that only an interpretation of § 1415(e)(2) empowering courts to grant such "appropriate" relief as retroactive reimbursement to parents in a proper case could fulfill the purposes of the Act. Otherwise, the Court stated, "the child's right to a *free* appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete." *Id.* (emphasis added).

B. The Fourth Circuit Correctly Interpreted *Burlington* and *Rowley* in Determining that the Private Placement Selected by Respondents Was "Proper under the Act"

In affirming the district court's finding that Respondents' child's placement at Trident Academy was "proper under the Act", the appellate court drew upon this Court's holding in *Board of Education of Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982) that the substantive education provided Respondent's daughter by Trident Academy was "reasonably

calculated to enable the child to receive educational benefits." Pet. App. at 17a. Noting that this is the same standard by which the appropriateness of a public school's proposed IEP is assessed, the appellate court correctly held that a private placement is "proper under the Act" for purposes of reimbursement if it meets this standard, providing education consistent to meet the IDEA's educational goals. Pet. App. 17a, citing *Tice ex rel. Tice v. Botetourt County School Board*, 908 F.2d 1200, 1208 (4th Cir. 1990) (standard is whether private placement "was proper to meet the Act's educational goals"). The rule adopted by the Fourth Circuit is thus faithful to *Burlington's* holding that "appropriate relief" in IDEA disputes means relief that is appropriate in light of the purposes of the act. *See* 471 U.S. at 369.

Congress' goal in enacting IDEA was to end years of educational neglect and to ensure that all children with disabilities are provided equal protection under the laws. In *Rowley*, 458 U.S. 176 (1982), the first case in which this Court considered the Education for All Handicapped Children Act, the predecessor of IDEA, it was noted that the Act was passed in response to the failure of the states to provide adequate education for students with disabilities. 458 U.S. at 179-181. The Court emphasized the importance of providing a child with disabilities personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. 458 U.S. at 188-89.

As the lower courts recognized, the education provided Shannon at Trident was more than consistent with these purposes. The district court expressly determined that Trident Academy provided respondent's daughter "an excellent education in substantial compliance with all the substantive requirements of the [IDEA]." Pet. App. 37a. Consistent with IDEA's emphasis on educational planning, goal setting, and accountability, Trident

set and revised students goals four times per school year."[12] *Id.* at 11a. Trident "evaluated Shannon quarterly, not yearly as mandated in the [IDEA], it provided Shannon with low teacher-student ratios, and it developed a plan which allowed Shannon to receive passing marks and progress from grade to grade." *Id.*[13] In reaching its determination the trial court relied upon substantial undisputed testimony by respondents' witnesses, C.A.J.A. 190, 193-93; 228-29; 238-39; 343-45; 350-51; 388, as well as on the court's own appointed expert, C.A.J.A. 326, 328, 330, 341. On appeal, petitioner did not even contest the district court's conclusion that Trident Academy provided Shannon with an appropriate education. Pet. App. 10a n.2. Specifically, the Court of Appeals found in this case that a private placement that, like Trident, meets these criteria may be "proper under the Act" and reimbursable under *Burlington* even if it has not been approved by the state for the child's placement under the Act. Pet. App. 17a. Although the term "approved" may have different meanings in different states and in different fact situations, in the context of this case the concept of being "approved" by the state is synonymous with the determination that the private school at issue "meets State education standards" under 20 U.S.C. § 1401(a)(18)(B).[14] As the Court of Appeals for the Fourth

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[12] Significantly, the regulations implementing IDEA only require review of students' educational goals annually. 34 C.F.R. § 300.343(d).

[13] In contrast, the district court determined that even if all of the goals set in the inappropriate IEP developed by Petitioner had been met, Shannon would have continued to fall behind her classmates at an alarming rate, and have been precluded from receiving passing grades and progressing from grade to grade. Pet. App. 36a.

[14] At least two aspects of the Fourth Circuit's opinion make this clear. First, the Court "respectfully decline[d] to follow *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563 (2d Cir. 1989), Pet. App. 16a, which the Fourth Circuit described as having held that "a private school placement cannot be 'proper under the Act," even if made by parents rather than public school

Circuit noted, this issue was not present in *Burlington*, for the Massachusetts Department of Education had "approved" the private school where the parents had unilaterally placed their son.

While holding that a private placement may be "proper under the Act" for purposes of *Burlington* without meeting state standards, the Fourth Circuit nonetheless safeguarded the legitimate role state education agency standards have in ensuring educational quality. The court recognized that "when parents unilaterally place their child in a private school that has not been approved by the state, they invariably bear some risk that the school will fail to provide an adequate education." Pet. App. 19a. To the extent that the education is inadequate, the placement will not have been "proper under the Act," and reimbursement will be barred under *Burlington*. *Id.* Petitioners have not claimed, here or below, that any lack of compliance with state standards by Trident Academy rendered Shannon's education inappropriate.[15]

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officials, when the private school in question does not 'meet the standards of the State educational agency.'" Pet. App. 16a, citing *Tucker*, 873 F.2d at 568. Second, the Court viewed as pertinent to its analysis 20 U.S.C. § 1413(a)(4)(B)(ii), which imposes the requirement that private placements made by public agencies discharging their IDEA obligations "meet standards that apply to State and local education agencies"

[15] Few federal courts of appeal have considered whether a unilateral placement must be made into a state-approved school or otherwise meet state educational standards in order to qualify for *Burlington* reimbursement. Of those courts that have considered the issue, it appears that only the Second Circuit, and then only under the New York scheme, has conditioned *Burlington* reimbursement upon prior state approval of the private school in question. *Tucker v. Bay Shore Union Free Sch. Dist.*, 873 F.2d 563 (2d Cir. 1989); *Antkowiak v. Ambach*, 838 F.2d 635 (2d Cir.), *cert. denied sub nom. Doe v. Sobol*, 488 U.S. 850 (1988).

The Fifth Circuit, in *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153 (5th Cir. 1986), permitted reimbursement for services the parent obtained for the child, even though that

C. The Decision Below Wisely Declines to Abrogate the *Burlington* Remedy in South Carolina and Other States That Fail to Provide A Mechanism By Which Parents Can Ascertain Whether A School Meets State Standards

In reasoning that in *Burlington* this Court did not intend to impose on private schools chosen by parents the whole panoply of duties the Act imposes on the state in order for such a placement to be "proper under the Act," Pet. App. 16a, the Fourth Circuit recognized that such a requirement would be unrealistic and unfair, particularly in circumstances such as these, where the private placement is the result of a complete default by the local educational agency of its statutory

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program "might not have been adequate under the EAHCA," because "[t]he *Burlington* rule is not so narrow as to permit reimbursement only when the interim placement is found to be the exact proper placement required under the Act." *Id.* The Fifth Circuit remanded the case for a determination of reimbursement due under the circumstances. The Fifth Circuit's analysis and disposition were consistent with *Burlington's* holding that "equitable considerations are relevant in fashioning relief." 471 U.S. at 374. Other courts permitting reimbursement in analogous circumstances include *W.G. v. Board of Trustees of Target Range School District No. 23*, 960 F.2d 1479 (9th Cir. 1992) (reimbursement for a tutor for implementing an IEP improperly refused by the school district) (citing *Alamo Heights*); *Garland Independent School District v. Wilks*, 657 F. Supp. 1163, 1166-67 (N.D. Tex. 1987) (low income parent was entitled to reimbursement for furnishing those services intended, to the extent the parent could afford, to create a "facsimile" of the residential placement ultimately ordered by the court); *Shirk v. District of Columbia*, 756 F. Supp. 31 (D.D.C. 1991) (school was not approved part of the time the student attended); *Carrington v. Commissioner of Educ.*, 535 N.E.2d 212, 216 (Mass. 1989) (allowing repayment for unilateral placement for school not on state approved list); *Thornock v. Boise Independent School District No. 1*, 767 P.2d 1241 (Idaho 1988), *cert. denied* 490 U.S. 1068 (1989) (allowing repayment for parochial school expenses when IEP not appropriate); *but see, Fagan v. District of Columbia*, No. 90-0371, 1993 WL 96965 (D.D.C. Mar. 25, 1993).

obligations. Furthermore, in view of South Carolina's regulatory scheme, any other result would have been tantamount to an abrogation of the *Burlington* remedy.

In South Carolina, if a child with disabilities is placed in a private school by the State education agency or local school district, the private school must comply with the Defined Minimum Program for South Carolina School Districts ("DMP") promulgated by the State Board of Education. S.C. Code Regs. 43-243(E)(7). The table of contents is seven pages long; the DMP itself more than 130 pages.

Unlike New York, Maryland, North Carolina and other states, see Brief Amicus Curiae of the States at 16-18, the South Carolina Department of Education has created no mechanism by which parents may determine whether a particular private school meets these voluminous standards. South Carolina does not maintain a list of schools that complies with the DMP and so are approved for the provision of special education, nor does it provide a mechanism by which a private school can apply for general approval to serve as a special education placement. Rather, the South Carolina Department of Education approves private schools for special education placements only in reference to the proposed placement of a particular child and, most importantly, *only when the proposed placement is initiated by the state or a local educational agency. See* S.C. Code Regs. 43-243(E). Not only are South Carolina parents unable to consult a list of schools that meet state standards, no process exists by which they may apply to the state for such a determination.

It is unrealistic in the extreme to suggest, as Petitioner does, *see* Pet'r Br. at 11, 25, that the same school district which is currently denying appropriate services and facing legal action as a result will assist parents in determining the suitability of a private school (payment for which the district may ultimately be

held liable by a court) under governing state standards, much less initiate the state approval process. It is also contrary to the state regulation, which allows for state approval only when the local educational agency itself seeks to place the child in a private school. *See* S.C. Code Regs. 43-243(E). Furthermore, approval will be granted only "[w]hen it is clearly not feasible to accord educational opportunity to handicapped children in a public school program." *Id.* Petitioner and other similarly situated local educational agencies would not be likely to make such an assertion.

This case amply demonstrates how requiring prior state approval of private school placements allows states to circumvent the *Burlington* remedy by refusing to approve the private school.[16] If Petitioner's contention is adopted, South Carolina--whose failure to fulfill its IDEA obligation, 20 U.S.C. §§ 1412-1414, to ensure the provision of an appropriate education by the school district triggered respondent's recourse to private placement--will have succeeded in eliminating *Burlington* as a viable remedy within its borders by the simple expedient of approving private schools as consistent with state standards only on a case-by-case basis at the behest of the offending school district, regardless of the actual educational needs of the child.

The Fourth Circuit wisely precluded this result, correctly reasoning that "[w]hen . . . schools fail to meet their responsibilities . . . parents may be left to their own devices in finding a school that provides the specialized educational environment necessary to educate their children. In such circumstances, it hardly seems consistent with the Act's goals to forbid parents from educating their child at a school that provides

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[16] *See also Straube v. Florida Union Free Sch. Dist.*, 778 F. Supp. 774, 780 (S.D.N.Y. 1991) (criticizing the Second Circuit's requirement of placement at a state-approved school in *Tucker* and *Antkowiak*).

appropriate education simply because that school lacks the stamp of approval of the same public school system that failed to meet the child's needs in the first place." Pet. App. 18a.

D. The Fourth Circuit Appropriately Concluded that 20 U.S.C. § 1413(a)(4)(B) Does Not Limit the Court's Remedial Authority to Grant Tuition Reimbursement.

Section 1413(a)(4)(B) is not a limitation on the authority of the court to award tuition reimbursement to parents who, when public school districts default in their obligation to provide free appropriate public education to their child, unilaterally place the child in a private school that is not "approved" by the State and not required to meet State educational standards. As the Fourth Circuit properly recognized, section 1413 imposes no requirement that a private school be approved by the state in parent-placement reimbursement cases. The legislative history contains no indication to the contrary, *see, e.g.*, S. Rep. No. 168, 94th Cong. 1st Sess. 32, 50, *reprinted in* 1975 U.S.C.C.A.N. 1425, 1456, 1473, Pet. App. 13a, and federal regulations and South Carolina law similarly apply state educational standards to private schools only when students are placed there by the state or school district. *See* 34 C.F.R. §§ 300.400-300.403; 300.347; S.C. Code § 59-33-50; S.C. Code Regs. 43-243(E)(7).

Section 1413(a)(4)(B) of the Act was intended to protect children with disabilities who are placed by the State or local educational agency. The court below discussed section 1413 and the legislative history of the Act only to emphasize that "Congress clearly envisioned that section 1413(a)(4)(B), and its requirement that private schools receiving funds under the Act meet state educational standards, would apply only when the child is placed in the private school by the state or local school system." Pet. App. 13a. The court simply held that section 1413

does not limit the authority of courts to award reimbursement where parents, responding to an LEA's default on its obligation to provide a free appropriate public education, make the appropriate placement.[17]

Congress recognized the need for states and local education agencies to use a variety of placement alternatives, including private schools, in order to appropriately educate all children with disabilities. Section 1413 was designed to ensure that children placed in private schools received the full protections, rights and opportunities intended for all children with disabilities. States and LEAs must abide by its provisions when using a private school as part of the continuum of alternative placements IDEA requires them to have available.[18]

E. The Relief Awarded Below Was Appropriate as Equitable Restitution

The courts below also had the authority, as part of their power to grant broad equitable relief, to award reimbursement as restitution, a traditional equitable remedy long recognized by this Court. For example, *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), considered whether restitution was a remedy available for violations of the Emergency Price Control Act.

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[17] Statutory language should be given its plain meaning. "When we find the terms of a statute unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances.'" *Garcia v. United States*, 469 U.S. 70, 75 (1984) (citing *TVA v. Hill*, 437 U.S. 153, 187 n.33 (1978)). The language of 20 U.S.C. § 1413 (a)(4)(B) applies exclusively to placements by state and local educational authorities. Whether the section is read in isolation or as part of the entire IDEA, it makes sense only if limited to those entities legally responsible for providing a free and appropriate public education.

[18] *See* 34 C.F.R. § 300.551(a) (requiring public agencies to insure that a continuum of alternative placements is available).

Even though the statute did not specifically grant the Price Administrator the power to seek restitution on behalf of overcharged tenants, this Court permitted the action:

> Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of jurisdiction. *And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.* Virginian Ry. v. System Fed'n No. 40, 300 U.S. 515, 552 (1937).
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> Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary or inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

Id. at 398 (emphasis added). *See also Hall v. Cole*, 412 U.S. 1, 12 (1973); *Hecht Co. v. Bowles*, 321 U.S. 321 (1944); *Metropolitan R.R. v. District of Columbia*, 132 U.S. 1 (1889); John W. Wade, *Restitution for Benefits Conferred Without Request*, 19 Vand. L. Rev. 1183, 1185, 1195-98 and nn.58-80 (1966).[19]

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[19] The Restatement of Restitution states, "A person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his conduct." Restatement of Restitution § 76 (1936).

Recent decisions of the Courts of Appeals have recognized the continuing vitality of this principle. For example, the Fifth Circuit held that the liability to the United States imposed on polluters by the Federal Water Pollution Control Act was quasi-contractual. *United States v. P/B STCO 213, ON 527 979*, 756 F.2d 364, 370-374 and nn.8-15 (5th Cir. 1985).

> Courts consistently have recognized these principles and have imposed on defendants a quasi-contractual obligation to reimburse a plaintiff, who has performed a duty, at his own expense, where the defendant was primarily obligated to discharge the duty. *This is especially true where the performance of the duty was necessary to preserve the public's welfare and safety.*

United States v. P/B STCO 213, ON 527 979, 756 F.2d at 371 (emphasis added); *see also Oneida Indian Nation v. County of Oneida*, 719 F.2d 525, 543 (2d Cir. 1983), *rev'd on other grounds*, 470 U.S. 226 (1985) [20]

The Carters discharged the school district's duty to provide special education and related services by enabling their daughter to obtain a high school diploma. The Carters provided

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[20] See also Restatement of Restitution § 113 (1936), which states, "A person who has performed the noncontractual duty of another by supplying a third party with necessaries which in violation of such duty the other had failed to supply, although acting without the other's knowledge or consent, is entitled to restitution therefor from the other if he acted unofficiously and with intent to charge therefor." The Carters supplied Shannon with the education she required, acting in their capacities as parents and in the exercise of their right to reimbursement.

the necessary education for their daughter: the school district did not. Awarding the Carters restitution both vindicates the purposes of the IDEA and provides school districts with an incentive for compliance; refusing restitution rewards school districts for the same behavior that led to the enactment of the IDEA.

II. The Terms of 20 U.S.C. § 1401(a)(18) Cannot Logically Be Applied to A Placement Made By a Parent In the Face of School District Opposition

Despite Petitioner's contention that parental placements must meet the definition of "free appropriate public education" set forth in 20 U.S.C. § 1401(a)(18) in order to qualify for reimbursement under *Burlington*, analysis of the statutory definition demonstrates that this is an improper and impossible burden. Two of the four criteria set forth in section 1401(a)(18) by their very terms cannot be met by, and are inapplicable to, parents who, forced by an LEA's default of its responsibility to provide a "free appropriate public education" to their child, must resort to self-help--using their own resources to locate and place the child in a program able to meet her individual needs.

The IDEA provides that, "[t]he term 'free appropriate public education' means special education and related services" that--(A) have been provided at public expense, under public supervision and direction, without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title." 20 U.S.C. § 1418(a)(18). Petitioner does not dispute the fact that Trident Academy provided Respondent with "special education and related services," as required by the first sentence of § 1401(a)(18), or that the

education provided by Trident Academy included "an appropriate . . . secondary school education in the State involved," i.e. South Carolina, as required by section 1401(a)(18)(C).[21]

While making much of Trident Academy's purported failure to meet the criteria of section 1401(a)(18)(B) and (D), Petitioner fails to recognize that § 1401(a)(18)(A) cannot logically be applied to placements made by parents pursuant to *Burlington* in response to a school system's violation of IDEA. In a case such as this one, where the private placement will necessarily have been made not only without the school system's cooperation, but over its objection and subject to litigation, the education received there will not be "under public supervision and direction," or "without charge," as required by section 1401(a)(18)(A).[22]

Similarly, the requirements of section 1401(a)(18)(D) do not apply, and logically cannot be made to apply, to placements made by parents in the face of public school system default. Section 1401(a)(18)(D) calls for provision of services "in conformity with the individualized education program required under section 1414(a)(5)." Section 1414(a)(5), in turn, requires a local educational agency such as Petitioner "which desires to receive payments under [IDEA] . . . to provide assurances that the local educational agency . . . will establish or revise . . . an individualized education program for each child with a disability

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[21] The district court found, and Petitioner did not dispute on appeal, that "'Trident Academy provided Shannon an excellent education in substantial compliance with all the substantive requirements of the [Act].'" Pet. App. at 6a and 10a n.2. Shannon graduated from Trident with a high school diploma recognized by the State of South Carolina. *See supra* n.7.

[22] Nowhere in the record below, for example, is there any indication that Petitioner sought to supervise or direct or otherwise assist in seeing that Respondent was properly educated during her time at Trident Academy.

. . . at the beginning of each school year." 20 U.S.C. § 1415(a)(5). The § 1414(a)(5) mandate to develop an IEP, and the § 1401(a)(18)(D) mandate to provide special education and related services in conformity therewith, thus run solely to local education agencies.[23]

Furthermore, an IEP by definition is a document prepared by public school personnel. The term "individualized education program" as used in 20 U.S.C. § 1401(a)(18)(D) "means a written statement for each child with a disability developed in any meeting *by a representative of the local educational agency* . . . who shall be qualified to provide, or supervise the provision of instruction to meet the unique needs of children with disabilities, the teacher, the parents or guardian of such child, and, whenever appropriate, such child." 20 U.S.C. § 1401(a)(20) (emphasis added). In Shannon's case, the "individualized education program" contemplated by §§ 1401(a)(18)(D) and 1401(a)(20) was the very IEP found by the district court to be inappropriate. Adoption of Petitioner's argument would condition Respondent's obtaining reimbursement on Trident Academy's having followed the inadequate IEP developed by Petitioner. It is unlikely that Petitioner, or any other school system embroiled in litigation with parents over the appropriateness of the IEP developed by that system, would concede that it had acted inappropriately in the past by developing a new IEP for implementation at a private school. Petitioner does not suggest that it showed any willingness to participate in the development of an IEP for use at Trident at any point during the three years Respondent spent there, with

[23] Significantly, even when a local education agency, rather than a parent, places a child with disabilities in a private school, the local education agency remains responsible for developing the child's IEP and ensuring that it is implemented. *See* 34 C.F.R. § 300.347.

Petitioner's full knowledge.[24]

Petitioner argues that the statutory definition of "free appropriate public education" limits the remedial powers of courts, yet arbitrarily omits from its analysis those components of the definition, discussed above, that by their very terms derail its argument. Petitioner offers no principled basis--indeed, no basis at all--for picking and choosing among the various components of § 1401(a)(18) to which courts and parents must adhere. Its contention that a parental placement must meet the statutory definition of "free appropriate public education" in order to be deemed "proper under the Act" for purposes of *Burlington* must therefore be rejected. Indeed, *Burlington* implicitly recognized and avoided the trap into which Petitioner now urges the Court to fall by using the phrase "proper under the Act," rather than "appropriate under the Act," to describe the permissible remedies under the IDEA.

III. 20 U.S.C. § 1415 and the Decisions of This Court Preclude the Curtailment of Judicial Remedial Authority Urged By Petitioner

A. Courts Acting Under § 1415(e)(2) Have Broad Authority to Grant Appropriate Relief Based Upon the Nature and Scope of the Violation Committed

At the root of Petitioner's contention that it cannot be required to reimburse parents for anything short of an education that meets the statutory definition of "free appropriate public

[24] Development of a new "IEP" by Trident personnel would not have satisfied § 1401(a)(18)(D), as it would not have been developed with the participation of Petitioner, as required by § 1401(a)(20), and so would not have been an "IEP" within the meaning of either provision.

education" is the flawed and dangerous assertion that reimbursement under the principles enunciated in *Burlington* is simply "an alternative manner of fulfilling" its statutory obligation to provide a free appropriate public education, see Pet. 19, to which the statutory definition ought therefore apply. Thus in Petitioner's view, a local education agency is at liberty to select one of two equally acceptable options for meeting the obligations imposed by IDEA: it can provide a free appropriate public education at the outset or, in the alternative, it can decline to do so, wait to be sued, litigate, and then, upon losing, reimburse those parents for the cost of procuring alternative educational services.

These are not equally acceptable options, however, and an LEA that chooses the latter violates IDEA. That a court may ultimately award monetary relief for the violation in no way alters the fact that rights were violated and legal obligations breached. Reimbursement under such circumstances is an equitable remedy for a violation, not an "alternative manner of fulfilling" an already-breached obligation.

Once reimbursement is properly understood as relief for an LEA's violation of a federal statute, rather than as an option for complying with that statute, Petitioner's proffered rationale for prohibiting the remedy approved by the Fourth Circuit collapses. Because reimbursement is a *remedy* for Petitioner's default upon its obligation to provide a free appropriate public education, it is irrelevant that "[t]he IDEA contains no condition . . . requiring states to fund *Burlington*-type placements apart from the explicit statutory obligation to provide a FAPE," Pet'r Br. 14, n.8, or that Petitioner "looks in vain through the provisions of the IDEA for language justifying compulsory public funding of such an education." Pet'r Br. 15. Petitioner points to no legal principle requiring that particular forms of relief for violation of a federal statute be spelled out therein before courts

may order them.[25]

On the contrary, the "general rule . . . is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." *Franklin v. Gwinnett County Public Schools*, 112 S.Ct. 1028, 1035 (1992). *Franklin* applied this principle to hold that damages are available as a remedy for violation of Title IX of the Education Amendments of 1972--a statute that not only lacks the explicit mandate to courts to "grant such relief as the court determines is appropriate," 20 U.S.C. § 1415(e)(2), but provides no express private right of action. As *Franklin* found to be the case with Title IX, IDEA contains no "clear direction to the contrary by Congress." *Franklin*, 112 S.Ct. at 1035. Indeed, although Congress chose to delineate the *obligations* of states and LEAs

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[25] Petitioner's reliance upon *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981), in support of this contention, see Pet'r Br. 14, n.8, is misplaced. *Pennhurst* did not deal with the question of *remedies* available for a state's violation of an enforceable federal right, but rather the question of whether § 6010 of the Developmental Disabilities Assistance Act created enforceable rights. After ruling first that the legislation had been enacted pursuant to Congress' spending powers and not pursuant to its power to enforce the Fourteenth Amendment, 451 U.S. at 18, the Court held that no enforceable rights had been created because, *inter alia*, "Congress fell well short of providing clear notice to the States that they, by accepting funds under the Act, would indeed be obligated to comply with § 6010," 451 U.S. at 25, as is required when Congress legislates pursuant to the spending clause. *See id.* at 17. *Pennhurst* is thus inapposite to the issue of what remedies are appropriate when an enforceable right has been created and violated.

There is no question that IDEA creates enforceable rights. *Honig*, 484 U.S. at 309-10. Furthermore, Congress enacted IDEA pursuant to its Fourteenth Amendment enforcement powers as well as pursuant to the spending clause. *Smith v. Robinson*, 468 U.S. 992, 1010 (1984). In any event, § 1415(e)(2) has been part of IDEA from the outset, placing States and LEAs on notice that the decision to accept funds under IDEA would subject them to orders for "appropriate relief" should they violate its provisions.

with specificity and detail,[26] it declined to do the same in regard to *remedies* for breaches of those obligations, leaving to courts the task of fashioning "such relief as the court determines is appropriate." *See* 20 U.S.C. § 1415(e)(2). As this Court noted in *Burlington*, "[t]he ordinary meaning of these words confers broad discretion on the court." 471 U.S. at 369.[27] This interpretation furthers "[t]he well-settled principle that the nature and scope of the remedy are to be determined by the violation." *Milliken v. Bradley*, 433 U.S. 267, 281-82 (1977).

Burlington itself authorized as a remedy a kind of "compulsory public funding," Pet'r Br. 15, not expressly contemplated by the text of IDEA, i.e., reimbursement for a private program of special education and related services neither designed through the IEP process pursuant to 20 U.S.C. §§ 1401(a)(18)(D), (a)(20), nor provided under public supervision pursuant to 20 U.S.C. § 1401(a)(18)(A). Under these circumstances, Petitioner's reliance upon *Burlington* to buttress its contention that the equitable powers of courts under 20 U.S.C. § 1415(e)(2) are limited by the statutory definition of free appropriate public education is particularly inapt. In this connection, Petitioner cites this Court's statement in *Burlington* that "[r]eimbursement merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP." *Burlington*,

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[26] *See, e.g., Rowley*, at 459 U.S. at 183 ("the Act ... imposes significant requirements to be followed."; see generally 20 U.S.C. §§ 1412-1416.

[27] *Franklin* found Congress' 1986 abrogation of Eleventh Amendment immunity for violations of Title IX to be indicative of Congressional intent *not* to limit remedies available under that statute. *Franklin*, 112 S.Ct. at 1036. Acting in the wake of this Court's decision in *Dellmuth v. Muth*, 491 U.S. 223 (1989), Congress in 1990 abrogated Eleventh Amendment immunity for violations of IDEA in 1990, evincing a like intent. *See* 20 U.S.C. § 1403.

471 U.S. at 370-71.[28] In context, however, the Court was simply distinguishing equitable reimbursement from damages, having stated in the preceding sentence, "[i]n this Court, the Town repeatedly characterizes reimbursement as "damages," but that simply is not the case." *Id.* The Court was not setting a limiting principle on the remedy it was recognizing.

Furthermore, taken to its logical conclusion, Petitioner's interpretation of the Court's explanation means that regardless of a school system's default on its obligations under IDEA, a parent cannot obtain reimbursement for the alternative educational program she arranges unless the program replicates what the school system should have provided. This result, correctly rejected by the court below[29] as well as by the Fifth Circuit,[30] is untenable for many reasons. First, parents lack the expertise to precisely determine what would constitute a free appropriate public education. It is unrealistic to believe that in an adversarial situation where an LEA faces financial liability for the parent's choice, school officials would assist parents to obtain private placement.[31] Second, parents who lack the resources to pay, even temporarily, for a private school placement would be foreclosed from supplementing the inadequate public program to

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[28] *See* Pet'r Br. at 13 and n.6.

[29] *See* Pet'r App. at 16a ("we do not believe that the Supreme Court, by requiring that the private school placement be 'proper under the Act,' intended to impose on private schools chosen by parents the whole panoply of duties that the Act imposes on the state").

[30] *See Alamo Heights*, 790 F.2d 1153, 1161 (5th Cir. 1986) ("[t]he *Burlington* rule is not so narrow as to permit reimbursement only when the interim placement chosen by the parent is found to be the exact proper placement required under the Act").

[31] As this Court noted in *Burlington*, "in any disputes the school officials would have a natural advantage." 471 U.S. at 368.

the extent that their means allow[32]. Third, in many cases, a public program other than the one actually proposed by the school system may have constituted free appropriate public education, had the LEA chosen or not refused to provide it; parents, of course, cannot make such a placement, regardless of their desire to have their child remain in their local public school system.[33] Fourth, the options available to a parent forced to resort to private placement by the public school system's default on its obligations under IDEA are limited by finances, geography and the number of private school programs providing services to students with disabilities.[34]

B. Limiting Remedial Authority to an Order Requiring A Local Education Agency to Provide a Free Appropriate Public Education as Defined by § 1401(a)(18) Would Eviscerate Judicial Enforcement of IDEA and Negate the Right of Parents Under § 1415(b) to Obtain Relief in

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[32] *See Garland Indep. Sch. Dist. v. Wilks*, 657 F. Supp. 1163, 1166-67 (N.D. Tex. 1987) (finding that low-income parent was entitled to reimbursement for furnishing those services intended, to the extent the parent could afford, to create a "facsimile" of the residential placement ultimately ordered by the court).

[33] *See, e.g., Greer v. Rome City School District*, 950 F.2d 688 (11th Cir. 1991), opinion withdrawn, 956 F.2d 1025 (1992), reinstated 967 F.2d 470 (1992)(parents seeking placement in public regular education classroom with appropriate aids and supports); *Oberti v. Board of Educ. of Clementon*, 801 F. Supp. 1392 (D.N.J. 1992), *aff'd*, No. 92-5462, 1993 WL 178480 (3d Cir. May 28, 1993).

[34] This is particularly true in rural areas like Florence County, and in primarily rural states like South Carolina. At no point in the proceedings below, for example, did Petitioner offer the parents the name of a single private school that would have met the statutory definition of free appropriate public education or have met Respondent's educational needs.

"Any Matter" Concerning the Education of Children with Disabilities

IDEA directs courts finding violations of its provisions to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). Petitioner recognizes that for purposes of this provision, "appropriate" relief is relief that is "'appropriate' in light of the purpose of the Act . . . [which] is primarily to provide handicapped children with a 'free appropriate public education which emphasizes special education and related services designed to meet their unique needs.'" *Burlington*, 471 U.S. at 369.[35] From this precept, however, Petitioner incorrectly concludes that the only relief that is "appropriate" within the meaning of § 1415(e)(2) is relief that orders an offending school system to provide an "appropriate" education, as defined by § 1401(a)(18). *See* Pet'r Br. at 17 and n.11. Put another way, Petitioner would bar courts from doing anything other than ordering state and local education agencies to comply with their existent--and, if relief is being fashioned under § 1415(e)(2), already breached--obligation to provide free appropriate public education to all eligible children with disabilities. *See* Pet'r Br. at 17 and n.11.[36]

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[35] *See* Pet'r Br. at 17.

[36] Petitioner's reasoning in reaching this conclusion is unclear. Petitioner apparently contends that the word "appropriate," however it may be used in the statute, e.g., "such relief as is 'appropriate,'" 20 U.S.C. § 1415(e)(2), must be given the four-pronged meaning of "free appropriate public education" found in 20 U.S.C. § 1401(a)(18). *See* Pet'r Br. at 17 and n.11. This same portion of Petitioner's brief may also be construed as contending that because (1) "appropriate" relief must further IDEA's goal of providing a "free appropriate public education," (2) the statutory statement of purpose states that one of the goals of the Act is "to assure that all children with disabilities have available to them . . . a free appropriate public education . . . ," 20 U.S.C. § 1400(c), and (3) section 1401(a)(18) defines the term "free appropriate public education," regardless of the circumstances relief is only "appropriate" if it orders a LEA

Such drastically curtailed judicial power is inconsistent with *Honig v. Doe*, 484 U.S. 305 (1988), which expressly held that the breadth of the equitable powers of federal courts acting under § 1415(e)(2) is separate and distinct from any limitations IDEA may impose on states and local education agencies. *Honig*, 484 U.S. at 327. Thus although 20 U.S.C. § 1415(e)(3) precludes a state or LEA from changing a child's educational placement without parental consent during the pendency of administrative or judicial proceedings under IDEA, § 1415(e)(2) authorizes a federal court, in exercise of its traditional equitable powers, to issue an injunction doing so in a proper case. *Honig*, 484 U.S. at 327.

Finally, Petitioner's extremely limited reading of section 1415(e)(2) is completely inconsistent with Congress' intention that IDEA function as a deterrent to the pervasive mistreatment of children with disabilities that prompted passage of the Act.[37] It would eviscerate the enforcement power of the courts, and effectively negate the right of parents under 20 U.S.C. § 1415(b) to bring complaints and, ultimately, seek judicial relief "with respect to *any matter* relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C.

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to provide or pay for an education that meets the technical requirements of 20 U.S.C. § 1401(a)(18). As discussed *infra*, regardless of the route it has taken to arrive there, Petitioner's conclusion is incorrect.

[37] The Act's legislative history is replete with references to exclusion from school, denial of access to appropriate programs and services, *e.g.*, "There are over 8 million handicapped children in the United States and only 3.9 million are currently receiving an appropriate education; 1.75 million . . . are receiving no education at all; and 2.5 million are receiving an inappropriate education." 121 Cong. Rec. H23702 (1975) (statement of Rep. Brademas).

§ 1415(b)(1)(E) (emphasis added).[38]

IV. The Threats to Public Education and State Educational Authority Envisioned By Petitioner Are Illusory

Petitioner raises the specter of a public policy debacle if the decision of the Fourth Circuit is allowed to stand: parents will manipulate the IEP process in order to circumvent the public school system, Pet'r Br. 24, 26, courts will inappropriately interfere in state and local educational policy, Pet'r Br. 23-24, and school systems' "ability to function equitably, or perhaps at all," Pet'r Br. 26, will be jeopardized. *Burlington*, and *Rowley*, provide ample protection against these exaggerated possibilities.

At the outset, it should be noted that petitioner's implicit characterization of children with disabilities as a drain on the public fisc, against which other children must be protected, divisively pits one group of children for whom it is responsible against another, which is more than a little ironic in light of the history of IDEA.[39] Left to their own devices prior to its

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[38] Consistent with 20 U.S.C. §§ 1415(b) and 1415(e)(2), courts have resolved complaints regarding a variety of IDEA violations, the remedy for which would entail action other than an order requiring a State or LEA to provide or pay for a particular placement constituting free appropriate public education. *See, e.g., Hacienda La Puente Unified Sch. Dist. v. Honig*, 976 F.2d 482 (9th Cir. 1992) (reinstatement of expelled student); *Muth v. Central Bucks School Dist.*, 839 F.2d 113 (3rd Cir. 1988), *rev'd on other grounds sub nom. Dellmuth v. Muth*, 491 U.S. 223 (1989) (violations of timeframes and procedures for due process hearings and decisions); *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23*, 960 F.2d 1479 (9th Cir. 1992)(reimbursement for tutoring); *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984) (providing clean intermittent catheterization as a related service.)

[39] Further, cost is not the determinative factor in deciding what constitutes an appropriate education. Even if an extremely expensive placement is necessary for the child to receive some educational benefit, the district still must

enactment, local education agencies such as petitioner and states such as South Carolina simply ignored children with disabilities, largely depriving them of public education.[40] As this Court recognized in *Rowley*, 458 U.S. at 179-81, Congress passed the Act in response to this history of unconstitutional neglect.[41] As

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pay for the placement. "[C]ost can be a legitimate consideration when devising an appropriate program for individual students. Nevertheless, cost considerations are only relevant when choosing between several options, all of which offer an 'appropriate' education. When only one is appropriate, then there is no choice." *Clevenger v. Oak Ridge Sch. Bd.*, 744 F.2d 514, 516 (6th Cir. 1984).

[40] Children with learning disabilities were the least likely to have their needs met. S. Rep. No. 168, 94th Cong., 1st Sess. 8, *reprinted in* 1975 U.S.C.C.A.N. 1432 (Bureau of Education for the Handicapped, U.S. Office of Education, estimated only 12% of children with learning disabilities were then being served).

The testimony of state Sen. James Waddell of South Carolina regarding his inability to obtain services for his son with learning disabilities presents the same failure to identify and provide services the children with disabilities as the present case, which occurred over a decade later. *Education of the Handicapped Amendments, Hearings on S. 896, S. 6, S. 34, S. 808 Before the Subcomm. on Handicapped of the Senate Comm. on Labor and Public Welfare*, 93rd Cong. 1st Sess. 183 (1973) (statement of James Waddell, state senator from South Carolina).

Children with learning disabilities continue to have difficulties in completing high school, particularly in South Carolina. Only 30.93% of students with specific learning disabilities aged 14 and older who exited the South Carolina educational system during the 1989-90 school year graduated with a diploma. Another 28.16% dropped out, 29.34% received a certificate of attendance, and the balance left for other reasons. Nationally, 51.85% of these students graduated with a diploma, 26.77% dropped out, 10.02% received a certificate of attendance, and the balance left for other reasons. United States Department of Education, *Fourteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* A-156 (1992).

[41] Two leading cases, *Pennsylvania Ass'n of Retarded Children (PARC) v. Commonwealth*, 334 F. Supp. 1257 (E.D. Pa. 1971), *modified*, 343 F. Supp. 279 (1972), and *Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972), provided much of the impetus for Congressional action. *See Rowley*, 458 U.S.

petitioner's response to Shannon demonstrates, the educational neglect of children with disabilities continues.

Allowing courts to award reimbursement under the circumstances of this case provides no more of an incentive for parents to inappropriately utilize IDEA to secure private education than does this Court's decision in *Burlington*, which itself imposes substantial barriers to such parents. The fact that parents must first incur the expense of private education is in itself a significant disincentive to private placement, as is the fact that they "do so at their own financial risk." *Burlington*, 471 U.S. at 374. The Fourth Circuit recognized that this risk serves as a critical brake to the speculative abuses cited by petitioner, warning that "parents who unilaterally place their child in an unapproved private school bear substantial risks--risks that function to ensure that our decision will not be a means through which parents can subvert the Act's emphasis on public education." Pet. App. 18a.

In addition, in order to defeat an action for reimbursement, a school district need only establish that its IEP was "appropriate" under what petitioner characterizes as "the lax standard of review for an IEP"[42] established by *Rowley*, *i.e.*, that

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at 192; *Honig*, 484 U.S. at 324-25; *Smith v. Robinson*, 468 U.S. 992, (1984). "[C]ongress perceived the EHA as the most effective vehicle for protecting the constitutional right of a handicapped child to a public education." *Id.* at 1008] A study conducted in 1973 listed 33 cases involving the education of children with disabilities. *Education of the Handicapped Amendments, Hearings on H.R. 4199 Before the Select Subcomm. of the House Comm. on Education and Labor*, 93rd Cong., 1st Sess. 75-76 (1973); by 1975, 46 court cases had been filed. 121 Cong. Rec. H23703 (1975) (remarks of Rep. Brademas). *See also* Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 Harv. L. Rev. 1103 (1979).

[42] Pet'r Br. 16.

it was "reasonably calculated to provide educational benefits." *Rowley*, 458 U.S. at 207. The administrative and judicial proceedings provided for by 20 U.S.C. § 1415 provide ample opportunity for school systems to present the evidence required to prove the substantive appropriateness of its IEP.[43] In the event that a proposed IEP is deemed inappropriate, parents must still demonstrate that the private placement they chose was "proper under the Act." *Burlington*, 471 U.S. at 370.[44]

Even then, *Burlington* provides that "equitable considerations are relevant in fashioning relief," *Burlington*, 471 U.S. at 374, affording courts the flexibility to take the circumstances of the particular case into account in determining whether to order reimbursement. Although the specific equitable factors, if any, to be considered will vary from case to case, their potential scope is more than sufficient to protect local educational agencies from parents with nefarious motives, as well as from liability for unnecessarily costly placements. *See, e.g., Alamo Heights*, 790 F.2d at 1161; *Town of Burlington v. Dept. of Educ. for the Commonwealth of Massachusetts*, 736 F.2d 773, 801 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985).

Given these safeguards, petitioner's assertions are as much an attack on *Burlington* as they are an appeal of the decision below. Indeed, without saying as much and in the name of "the federalism balance so carefully struck in the Act," Pet'r Br. 24, petitioner would enlist this Court in the creation of a

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[43] The numerous cases denying parents reimbursement demonstrate that school systems have been quite successful in doing so. *See, e.g., Hampton Sch. Dist. v. Dobrowolski*, 976 F.2d 48 (1st Cir. 1992); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 1122 (1991); *Livingston v. DeSoto County Sch. Dist.*, 782 F. Supp. 1173 (N.D. Miss 1992).

[44] Here, too, section 1415 provides ample opportunity for school districts to present evidence that this was not the case.

scheme under which it and other South Carolina school districts would be immune from awards of reimbursement, despite *Burlington*. With no list of approved schools and no alternative mechanism for ascertaining whether a school meets state standards, South Carolina parents can always be barred from *Burlington* reimbursement if petitioner's view is adopted. Such a result is utterly inconsistent with the purposes of the Act.

Petitioner appears to object generally to being held accountable when it violates the rights of students with disabilities. Petitioner's contention that "[t]he issue here . . . involves proper recognition of state authority," Pet'r Br. 23, and its objection to federal courts determining the propriety of "*Burlington*-type parental placements," Pet'r Br. 23, can best be understood in these terms. Absent from these arguments is any recognition that "*Burlington*-type parental placements" are made, and courts called upon to determine their propriety, only after the state, or a local education agency for whose IDEA compliance the state is ultimately responsible,[45] has violated rights and obligations under federal law. Under such circumstances, relief such as that awarded by district court and approved by the Fourth Circuit constitutes not improper usurpation by federal courts of the expertise of education authorities, but enforcement of federal law.[46]

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[45] *See* 20 U.S.C. § 1412(6).

[46] The Fourth Circuit took pains to balance respect for state authority with the obligation to enforce federal rights. The court made a point of explaining that it intended "in no way to disparage the process through which states impose standards upon public schools and certify teachers as qualified to teach in particular subject areas," Pet. App. 19a, noting that "[s]uch state regulatory mechanisms play a positive and important role in ensuring educational quality." *Id.* Nonetheless, it could not be consistent with IDEA to condition reimbursement upon state approval "when the state has defaulted on its statutory obligations." *Id.*

Petitioners control their own destiny, financially and programmatically. The IDEA grants states and local school districts great latitude in designing the required continuum of alternative placement options and in determining the parameters of an appropriate IEP for each child they serve. Petitioners have the power to develop appropriate programs and placement alternatives that cost less than private placement. Had they done so here, respondent would not have been forced to enroll in a private program far from home.

CONCLUSION

The decision of the United States Court of Appeals for the Fourth Circuit should be affirmed.

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